TWO TREATISES

Written by

JOHN SELDEN

OF THE

INNER-TEMPLE, Esquire.

The First,

Of the ORIGINAL

OF

Ecclesiastical Jurisdiction

OF

TESTAMENTS:

The Second,

Of the Disposition or Administration

OF

Intestates Goods.

LONDON,

Printed for *Thomas Basset* at the *George* in *Fleet-street*, and *Richard Chiswell* at the *Rose* and *Crown* in S. *Paul's* Church-Yard.

MDCLXXXIII.

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PART I.

OF THE

ORIGINAL

OF

Eccleſiaſtical Juriſdiction

OF

TESTAMENTS.

CHAP. I.

The Intrinſecal Juriſdiction not given to the Church by the Civil Law.

THE Juriſdiction of Teſtaments being either *Intrinſecal* or *Extrinſecal*, (that is) either touching Probate, or Recoveries of Legacies: Firſt for the *Intrinſecal*, it is clear that it came not to the Biſhop by Imitation; or otherwiſe, from the Imperial Civil Law: for by the elder part of that Law, regularly the Probate or Aperture of Wills was before the (*a*) *Prætor*. And afterward the obſignation, inſinuation and Probate of them in *Rome*, was before the *Magiſter Cenſus*, or (*b*) *apud officium Cenſuale*, as it were before the Barons of our Exchequer; and that continued into later time. And the ſame Officer by the name of (*c*) γενικὸς, or *generalis* in *Conſtantinople*, had the ſame authority: But alſo afterwards as well the *Queſtor*'s Seal, as that of the *generalis* became to be uſed at the obſignation, and his authority alſo in the Probate or Aperture. And

(*a*) ff. Teſt. quemadmodum aperiant. per tot. Et vide etiam Auth. 74. c. 2. ſit igitur Licentia.

(*b*) De Epiſc. l. 41. & tit. de teſtam. l. 10. & 23. & Caput Theodoſ. ll. 4. tit. 4. l. 4. Ubi viſendus interpres vetus.

(*c*) Authent. 44. & ibid. Cujacius, & videſis Gloſſ. Græcobarb. Meurſii in γενικὸν.

And the Emperour *Leo* (*d*) about the year 890. transferred all that herein belonged to the *Generalis* into the *Questor*'s place; yet so, that some other Civil Magistrates had the like authority: and what was done before these in *Rome* and *Constantinople*, was in other Cities before their Chief Governours, as *Defensores* or *Præsides*: neither was the Church permitted to have to do with the Insinuation of Testaments, but expresly forbidden by a rescript (*e*) of the Emperour *Justin*: nor is any thing that gives it either among the *Novells* of the *Greek* Empire, or in the *Lombarda*, or *Capitulares*, which have (*f*) been reputed as parts also of the Imperial Law.

(*d*) Novel 44. formulas vet. Testam. aperiendorum, videsis I. Paul Regest. sentent. l. 4. tit. 6. & Marculph. Formul. l. 2. c. 37. & 38.

(*e*) C. de Episc. & cler. l. 41. repetita.

(*f*) Hostiens. in procem. sum. & veriusti-ores canonist. passim.

CHAP.

CHAP. II.

Nor by the Canon Law.

NEither in any General Council, or other part of the received Canon Law, doth any Testimony occurr, that gives the Church this *Intrinsecal Jurisdiction*. But in the fourth Council of (*a*) *Carthage* holden in the year 398. it was ordained, *Ut Episcopus tuitionem testamentorum non suscipiat*. And this being then established by two hundred and fourteen Bishops, was afterwards made a part of (*b*) the Decrees, or *Canon* Law, collected by *Gratian*, and published and authorized by Pope *Eugenius* the Third about 1150. and the Gloss upon that Canon interprets *tuitio* for *Aperture* or *Probate*. So also Pope (*c*) *Innocent* the Fourth understands it: *publicatio* (saith he) *fieri non debet apud Episcopum*; and he vouches that Law, (*d*) *Consulta ducalia tit. de Testament.* to prove it. *Speculator*, *Hostiensis* and others of the same time, and generally the rest that follow them, make the *Civil Law* only the square of the Jurisdiction of the *Probates*; and so it is truly affirmed in our Books, that the *Probate* belongs not to the Church (*e*) by the Spiritual Law; neither is any such thing given by any later (*f*) Bull, or Decretal from the Bishop of *Rome*.

(*a*) Cap. 18.
(*b*) Dist. de secular. negotiis, cap. 5.
(*c*) Ad c. nos quidem extra tit. de testament.
(*d*) Tit. de Instrum. edit. S. ostens. 34. vid. D. D. ad c. nos quidem, & c. si hæredes extra tit. de test. & Linwood de test. c. item S. infin. & cap. stat. S. approb.
(*e*) 2 R. 3. Test. 4. 14 H. 7. fo. 12. b.
(*f*) Quod discimus ex Bullarii summa quam edidit S. Guaranta.

CHAP. III.

The Extrinsecal Jurisdiction by the Civil Law, in whom.

FOr the *Extrinsecal* Jurisdiction that gave *Recoveries of Legacies*, by the Imperial Civil Law, where the Legacies were *in pios usus*, the (*a*) Bishop of the Diocess sometimes by himself, sometimes with the Civil Magistrate, provided for the execution of the Testators meaning: otherwise the Jurisdiction of Legacies, and what else falls under Testamentary disposition, was and (*b*) is the Magistrates only.

(*a*) C. de Episc. & Cler. l. 28. Nulli, & l. 49. si quis ad declinand authentic. 135. c. 10. & vid. c. 11.
(*b*) ff. de Petit. hæred. & tit. de legat.

CHAP. IV.

In whom by the Canon Law.

BUt by the *Canon Law*, the general care of execution of Teſtaments is committed to the Biſhop: yet I find not any *Canon* to that purpoſe received into the Body of that Law, now in authority, before the time of the *Decretals*; which have out of ſome Council of *Mentz* theſe words, *viz.* (*a*) *Si hæredes juſſa Teſtatoris non impleverint, ab Epiſcopo loci illius omnis Res quæ eis relicta eſt Canonice interdicatur, cum fructibus & cæteris emolumentis, ut vota defuncti impleantur.* Out of what Council of *Mentz* this is taken, I have not yet learned; (*b*) but in the ſame ſyllables it occurrs in *Burchard*, that lived about ſix hundred years ſince, with the Marginal Note of *ex Concilio Mozuntino*. What other Texts are, touching the power of the Canons over performance of Teſtaments, have reference to that courſe ordained by the Civil Law, where any thing was given *in pios uſus*, not to a general Juriſdiction; for ſo is the Canon *Nos quidem extr. tit. de teſtam.* Neither is that Canon *Ultima Voluntas* in *C.* 13. *q.* 2. taken out of S. *Gregory*, otherwiſe to be underſtood, if you interpret it as you ought by thoſe (*c*) places of *Gregory* whence it is taken: but the Canoniſts generally upon that Canon *Si hæredes*, take it, that *executio teſtamentorum ad Epiſcopos ſpectat.* And ſo thoſe old ones Pope *Innocent* the Fourth, *Bernard*, and others of the reſt deliver; and the (*d*) latter follow them, yet they commonly reſtrain it (and that in practice in other States) to Legacies given *in pios uſus*. And in the Council of *Trent*, where twice the Biſhops power over Teſtaments is provided for, (*e*) nothing is ſpoken of but Commutations of Legacies, and of ſuch as are given *in pios uſus*: yet from Ancient time both the *Intrinſecal* and *Extrinſecal* Juriſdiction of Teſtaments made of perſonal Chattels in *England*, hath been and is in the Church, except in places where ſpecial Cuſtom excludes it: the original whereof being not ſufficiently found in either of theſe Laws (the Civil and Canon) divers parts of which according to the various admiſſion of ſeveral Eſtates have been much diſperſed through *Chriſtendome*, and ſome remain now exerciſed by *imitation* among us; It reſts, that diſquiſition be made for it in the Monuments of the Kingdom, that according as they together with the Canons afford light, ſome conjecture may be had touching the Antiquity and ground of it.

(*a*) Extr. de teſt. c. 6.

(*b*) Lib. 15. c. 34.

(*c*) Videſis Greg. lib. 3. Epiſt. 9. & lib. 9. Epiſt. 20.

(*d*) Vid. Gonzal. Zuarez Prax. Eccleſ. Lam. 2. Prælud. 2. Sect. 44. & Zerula prop Epiſcop. verb. leg. ad quæſt. 9.

(*e*) Seſſ. 12. de reform. cap. 6. & Seſſ. ult. de reformat. c. 4.

CHAP.

CHAP. V.

Of the Intrinsecal Jurisdiction in the Saxons *time.*

THe Eldest Testament that I have seen made in *England*, is that of King *Edgar*'s time, made by (*a*) one *Birthric* a *Gentleman* or *Thane* (it seems) of great worth, and his Wife *Elswith*; wherein they devise both Lands and Goods; and in the end of the Will sayes her husband. And ic bidde for godes lufan minre leofan Hlafdian. ꝥ he ne þurige ꝥ æniġ man unceapne cyde awende; *And I pray for Gods love my leefe Lord, that he doe not suffer that any man our Testament do break.*

(*a*) Lamb. Peramb. Cant. p. 548.

It may perhaps thence be collected, that the Protection or Execution of this Testament was within the Jurisdiction of the Lords Court, as also the Probate; and that especially, because divers *Lords* (*b*) *of Mannors* have to this day the Probate of Testaments by Custom continued, against that which is otherwise regularly setled in the Church. But the same Testament being for Lands as well as for Goods, it may be that this Clause had reference to the Lord in regard of the Land only, (to the Alienation of which, his Assent might be requisite) or to denote him for the Testators best friend, as one chosen Overseer of his Will; and indeed he desires all other good people to see his Will be not broken; which makes me only offer it, as what another mans fancy may work on: but I conceive not out of it enough to prove either way any thing touching the Jurisdiction of Testaments.

(*b*) Hensloes Case 9. Rep. *b.*

Nor in the *Saxon* times appears any thing that can sufficiently direct us to know, how it was exercised here, unless out of that example of *Siwerth* of *Durham*'s Testament, in the (*c*) Book of *Ely*, you may collect, that the Probate was supply'd in the life-time of the Testator by Inrolment, or leaving an Indented Copy of it with the *Alderman* or *Sheriff* of the County, in whose *County-Court* the most of proceedings of Temporal Justice, and of the Spiritual also (for the Bishop sate with him, as in his Consistory) were in the *Saxon* times: for so much perhaps may be conjectured out of it, as we faithfully here relate it. *Siwerth* in King *Edgar*'s time, lying sick at *Lindane* in the *Isle of Elie*, makes his Testament, and sends for *Brithnorth* Abbot of *Elie*, and divers of the Monks, and others of the Gentry; and the Abbot writes the Testament *in tribus Chirographis, coram* (so are the words of the Book) *cunctis fecit recitari, lectumq; fecit incidi, unamque partem Chirographi retinuit Siferthus, Alteram autem dedit Abbati, tertiam vero misit statim per præfatum Brithelmum* (that was one of the Gentlemen of the Countrey then present) *Ailwino Aldermano, qui tunc temporis degebat in Elie, & petiit ab illo ut suum Testamentum stare concederet, quomodo Abbas illud scripserat, & ordinaverat apud Lindane coram prædictorum Testimonio virorum.*

(*c*) In Bibliotheca Cottoniana.

In lib. concess. fer.

Cum itaque Ailwinus Alderman hæc audisset, & Chirographum vidisset, remisit illico ad eum Wlnothum de Stowe cum Brithelmo, scisciatusque est ab

ab eo quid aut quomodo vellet de Teſtamento ſuo : qui mox per eoſdem renuntiavit ei, ſic ſuum Teſtamentum abſque omni contradictione vel mutatione ſe velle ſtare, ſicut præfatus Abbas illud in Chirographo poſuerat, quod ut Ailwinus Alderman audivit, totum conceſſit, ut ſtaret ſicut ipſe Siverthus Teſtatus erat. But in deed, in it Lands lying in *Durham* were deviſed to the Abbey; and ſo, it was not only of perſonal Chattels.

The *Saxon* Laws are very ſilent of any thing touching Teſtaments; and we muſt remember, while we think of that example of *Siwerth* of *Durham*, that the Eccleſiaſtical and Temporal Courts of Common Juſtice, held as one by the Sheriff and Biſhop, were not ſevered as now, into the Conſiſtory, and County Court, until the *Conqueror* did it by a Law yet remaining and elſewhere publiſhed (*a*).

(*d*) V. Spicilegia in Eadmerum.

In what intercedes from this time, until about *H.* 2. I find not any Teſtimony that gives light to this purpoſe; as the *Saxon* Laws, ſo thoſe of the *Conquerour*, and of *H.* 1. and *H.* 2. mention nothing that taſts of either kind of Juriſdiction of Teſtaments; only of a Charter of *H.* 1. extant in *Matth. Paris*, and in the *Red Book* of the Exchequer this occurrs, *Si quis Baronum vel hominum meorum infirmabitur, ſicut ipſe dabit vel dare juſſerit pecuniam ſuam, ita datam eſſe concedo.* This may perhaps ſeem to denote, that the Kings Court determined of Legacies, eſpecially of the Kings Tenants.

But indeed it proves not ſo much. But the eldeſt paſſage that proves clear enough here, is that which makes the *Intrinſecal* Juriſdiction to have been in the Church, and the *Extrinſecal* in the Kings Court; I mean that which is found in the Treatiſe attributed to *Randall* of (*e*) *Glanvill* Chief Juſtice under *H.* 2. where he ſayes, that *if a Legacy be detained, the Executors or other friends of the Teſtator, were to get the Kings* Writ *to the Sheriff, commanding quod juſtè & ſine dilatione facias ſtare rationabilem diviſum*, (that is, the Bequeſt or Legacy) *N. ſicut rationabiliter monſtrari poterit quod eam fecerit, & quod ipſam ſtare debeat, &c.* And it is plain by the words there preceding and ſubſequent, that it hath reference to moveable or perſonal poſſeſſions, not to Lands, *&c.* So that it ſeems clear by that in *H.* 2. his time, the Juriſdiction of perſonal Legacies was in *Secular Courts*. But if the Iſſue in Secular Courts upon that Writ came to be, whether the Teſtament were true or no, or well made, or whether the thing demanded were *in facto* bequeathed, *Tum* (ſayes he) *placitum illud in Curia Chriſtianitatis audiri debet, & terminari, quia placitum de Teſtamentis coram Judice Eccleſiaſtico fieri debet, & per illorum qui Teſtamento interfuerint teſtimonia ſecundum juris ordinem terminari*: that is, as it muſt be underſtood, that upon iſſue of bequeathed or not bequeathed, of Teſtament made, or no Teſtament, the *Tryal* muſt have been otherwiſe than by the practice of the latter (*f*) Law, wherein the Teſtament is traverſable, and the Traverſe tryable in the Kings Court by *Certificate* to the Temporal Court from the Eccleſiaſtical, as at this day, of *Inſtitution*, *Baſtaray*, and *Profeſſion* in Religion, and the like: and thence may it be well concluded, that at this time by the practiſed Law, the Probate or the Intrinſecal Juriſdiction was in the Church; for as the *Inſtitution*,

(*e*) Lib. 7. cap. 6. & 7.

(*f*) 29 Ed. 3. 33. *a.* 44 Ed. 3. 16. *a.* Perk. 493. 22 H. 6. 52.

Baſtaray

Baſtardy and *Profeſſion* are to be certified, becauſe within the Biſhops Juriſdiction. Some recorded Teſtimonies remain of the firſt and third, and the nature of the Marriage or Cohabitation (that directs in the ſecond) is to be judged of only in the Spiritual Courts; ſo the *Validity of the Teſtament*, or the truth of this or that particular Legacy was to be certified from the Spiritual Court, becauſe the Probate had there proceeded, and the Copy there remaining was moſt authentick; otherwiſe to what purpoſe ſhould they have ſent to the Spiritual Court in ſuch a caſe?

But on the other ſide, as in the caſe of *Inſtitution*, *Profeſſion* and *Baſtardy*, the conſequence of them, which are objects of their Extrinſecal Juriſdiction, as *Deſcent*, *Excluſion* from Inheritance, gaining it by a deſcent caſt, or legal making a Church full, or the like are determinable only at the Common Law; ſo the conſequence of a Teſtament, that is, the Recoveries of Legacies, and ſuch like, as it ſeems by that Writ, were in the Temporal, not in the Spiritual Court. I know the authority of that Treatiſe is ſuſpected, and ſome of the beſt and ancienteſt Copies having the name of *E. de N.* which I have heard from diligent ſearchers in this kind of Learning, affirmed to have been ſometimes *E. de Narborough*, and not *R. de Glanvilla*, it hath been thought to be anothers Work, and alſo of later time. But, as on the one ſide, I dare not be confident, that it is *Glanvills*, ſo I make little queſtion, that it is as ancient as his time, if not his Work. The Teſts of the Precedents of Writs under his name, the language, eſpecially the name of *Juſtitia* alwayes for that which we now from ancient time call *Juſtitiarius*; and *Juſtitia* was ſo uſed in (*g*) Writers under *H.* 2. and the Law delivered in it taſteth not of any later Age. And howſoever it comes to paſs, the *Regiam Majeſtatem* of *Scotland* publiſhed by Command of *David* the Firſt under the time of our *Hen.* 1. hath for the moſt part the ſame ſyllables with this ſuppoſed *Glanvill*, and expreſly (*h*) the very paſſages and the Writ that we have now here noted for Teſtaments.

(*g*) Ita Jo. Salisburgenſis de Nugis Curial. lib. 5. cap. 15. & 16.

(*h*) Regiam Majeſtat. lib. 2. cap. 38.

That Extrinſecal Juriſdiction of thoſe times in the Secular Courts, was perhaps denoted by thoſe words in the Teſtament of *Theobald* Arch-Biſhop of *Canterbury* under King *Stephen*, (*i*) *Supremis* (ſaith he) *deficientium voluntatibus ſuum accommodant jura favorem*, where he deviſes only perſonal things and uſes. I think, *Jura* is rather to be taken for the Common Law, than the Spiritual; which is, in the moſt uſual phraſe of that time, deſigned by *Canones*.

(*i*) Jo. Sarisburg. Epiſt. 57.

In this time of *Hen.* 2. divers fierce Controverſies fell between the Law and Spiritual Juriſdiction, and the particulars of them are largely related at the end of *Quadrilogus*, in *Gervaſe* of *Dover*, in *Roger* of *Wendover*, in *John* of *Salisbury*, and *Matthew Paris*, but in him moſt abruptly; yet not the leaſt mention is in them touching any matter of this Juriſdiction; and in the main Caſes of our Spiritual Courts depending under *H.* 2. and ſent by appeal to *Rome*, which yet remain in the Epiſtles of *John* of *Salisbury*, there is not one that touches upon either of theſe Juriſdictions of Teſtaments in the Church; but indeed there is one that may ſeem ſomewhat to prove for that which

we note out of *Glanvill*, concerning the Intrinſecal Juriſdiction at that time in the Temporal Court: for in an Appeal ſent to Pope *Alexander* the Third, the Caſe, as *John* (*k*) of *Salisbury* relates it, was, that one *Richard de Aneſtia in foro ſecularium Judicum petitionem hæreditatis ad bona avunculi obtinenda inſtituit*, againſt *Mabile de Franckvilla*, being Daughter to *William* of *Sackvill*, to whom the Plaintiff was Nephew by his Siſter: and the point of the iſſue between the Daughter here and the Nephew, being upon the Baſtardy of the Daughter, the Spiritual Court had the Tryal of it. If (*bona*) here be underſtood for Chattells, as in our Law it is, and ſo reſtrained, then was this *petitio hæreditatis*, as a Suit for *Sackvill*'s Goods, grounded alſo, as it ſeems, upon a Teſtament of his: for in the relation of the Caſe alſo, *Richardus inſiſtebat*, ſayes the Author, *inſtitutioni Avunculi, petitionem hæreditatis inſtituens.*; and on the other ſide, *Mabile maxime Patris noviſſimæ voluntati innitebatur:* which ſhews, that here was a Teſtament in the Caſe, and a Suit for what was challenged by it in the Temporal Court: But *hæreditas* and *bona*, it is likely, included here (as by the Civil Law) all poſſeſſions of the Anceſtor, both real of Inheritance, and perſonal, that is, the *univerſum jus defuncti*, and not only our inheritance; although it doth alſo amongſt ſome (*l*) Civilians denote no more, if at leaſt they underſtand aright what they ſay, while they write, that *conſuetudo eſt in Anglia quâ primogenitus ſuccedit in omnibus bonis:* and in this Caſe, if the Iſſue had been upon the Truth of the Teſtament, as it was upon the Baſtardy, it had been referred alſo to the Spiritual Judges.

(*k*) Epiſt. 89.

(*l*) Barth. ad tit. de ſumma Tr. l. 1. num. 42.

CHAP.

CHAP. VI.

Whence Linwood *thinks the Jurisdiction Intrinsecal came to the Church.*

BY what is before delivered, it appears, that the *Intrinsecal Jurisdiction* or *Probate* was in the Church; and that by expres testimony, as anciently as the time of *H.* 2. and by all probability it was in setled use before that time, being spoken of in that Treatise called *Glanvill*'s, as a known course of proceeding: although indeed yet I could never see an expres Probate in any particular case, elder than about *H.* 3. But the beginning or course of this *Intrinsecal* Jurisdiction in the Church, is not for ought I have yet learned, extant: however *Fairefaxe* tells us, that it was by an Act of Parliament, which perhaps he took from that of *Linwood*; *Hæc libertas* (*Ecclesiæ*) *quoad approbationem hujusmodi* (saith *Linwood*) *fundatur super consensu Regio, & suorum Procerum* (*in talibus*) *ab antiquo, concesso.* Where he means by *in talibus*, their power of committing of Administration of Intestates goods, as it is plain by his quotation of that Constitution of Arch-Bishop *Stafford tit. de immunitate Eccles. accidit. novitate perversas quidam etiam:* That power was given, as I gues, by Parliament in King *John*'s time: but thereof more in due place. And *Linwood* addeth, *Item fundatur super consuetudine in ea parte de scientia Regum Angliæ, diutius conservata:* Which is indeed, that it is founded upon the Common Law or Customary Law of the Kingdom; or that it hath like antiquity or original as other parts of the Common Law, that is, immemorial Custom. For though it be exercised according to the Civil and Canon Law in the Spiritual Courts, with some reference had to the Customs of *England*; yet it is clear, that the power which the Spiritual Courts have to exercise it, is meerly by the Common Law; although we find not when it came first to them, no more than we find divers of our setled Courses and Maxims in the Common Law; touching which yet we can without much difficulty prove, that at such or such times they were not in practice; as perhaps in the more ancient Ages, this was not in these Courts. But that it was originally belonging to the Crown, that is, to the *Temporal Courts*, which are all, and ever were derived from the Dignity Royal, is affirmed also, as in that cited in *Hensloe*'s Case, out of *Jocelin*'s History of the Arch bishop of *Canterbury*, in a Writ (*a*) 2 *H.* 5. that prohibiteth the Arch-bishop of *York* to call the Executors of the Tenants of S. *Leonard*'s Hospital to prove their Wills before him; because as the words are, *placita de cognitionibus scriptorum in Regno nostro Angl. ad Nos, Coronam & dignitatem nostram specialiter pertinent*: and also they had time out of mind used to prove them before the Masters and Brothers of the Hospital. Here we see the *Testaments* reckoned as other *Evidences*, the Tryal and Conusance whereof belongs only to the Temporal Courts: and at this day (*b*) by

2 R. 3. tit. Testam. 4.

Tit. de Test. C. stat. verb. Ecclesiæ libert.

(*a*) Cod. MS. Hosp. S. Leonardi in Biblioth. Cottoniana.

Hensloes Case apud v. cl. Ed Cook par. 9. fo. 37, 38, 48.

by ſpecial Cuſtom many Lords of Mannors have like *Probate* in their *Courts Baron.*

That in *France* Probates are in the Spiritual Courts.

By the way, for that which *Fairefaxe*, and others following him, tells us, that in all other Countries the *Probate* belongs to Lay-Judges, he is deceived, and deceives his Readers. Indeed, in the moſt places of other States it belongs to the Lay-Judges: but in *France* (c) generally the Spiritual Judges, both before *Fairefaxe* his time and ſince, had this Juriſdiction of *Probate*, and ſo have had without controverſie ever ſince the diſputations about it and other parts of Juriſdiction had with ſome Clergy-men, by *Coniers* Attorney General to *Philip Valois*, and *Peter Dreux* in behalf of the Duke of *Britain*, at ſuch time as the Clergy had there ſo extended their Juriſdiction, *Que les Fauxbourgs eſtoint trois fois plus grands que la ville*, as *Paſquire* ſpeaks of them.

(c) Choppin. de Dom. Franciæ lib. 2. pag. 230. Edit. 1588. & videſis teſtam. Leolodi Abbatis Floriani Helgundi initio.

CHAP.

CHAP. VII.

Testimonies of King John *and* Henry *the Third's time, that may serve to prove the Extrinsecal Jurisdiction then in the Temporal Courts.*

FOr the *Extrinsecal* Jurisdiction, as it seems by *Glanvill* and other Testimonies, that it was in the Kings Courts under *H.* 2. and so by all probability before: so out of other Records of following time, somewhat may perhaps be collected to prove, that it continued long in them, as out of the *Patent* of King *John* for *Oliver* of *Rochford's* Testament, *Sciatis* (sayes (*a*) the King) *Nos concessisse Testamentum Oliveri de Rupe forti sicut rationabiliter conditum est, & apud S. Florentiam veterem & Rupem fortem scriptum & ordinatum. Quare volumus & firmiter præcipimus quod nullus Executorum Testamenti ipsius impediat quin illud sicut rationabiliter conditum est faciant.* Then out of that of *Peter de Roches* Bishop of *Winchester*, and Chief Justice of *England*, touching the Will of *Adam* of *Gurdun*, *Rex* (*b*) *Dom. P. Winton. Episc. Justic. Angl. &c. Mandamus Vobis quod teneri facias Testamentum Adæ de Gurdun quod fecit de Rebus suis mobilibus & omnibus aliis in Angl. secundum dispositionem testamenti excepta terra quam de domino nostro habuit septimo Augusti. Teste meipso*: this expresly gives some legal execution of a Testament made of personal things unto the *Chief Justice* of *England*. And in (*c*) 5 *H.* 3. *Robert* of *Lexinton* having the possession of all the goods of *Philip de Uletott* the Testator, a *Writ* goes out to him to pay *William* Earl of *Salisbury* a debt of Ninety Marks out of them, and that the rest should be delivered to the Executors *ad faciendum Testamentum*; and another *Writ* was sent, that he should *per visum & Testimonium Execut.* sell all *Uletott's* goods, *& denarios quos inde fieri feceritis, salvo faciatis reponi sub sigillo vestro & sigillo Executor. predict. donec aliud mandatum nostrum inde habueritis.* And in 7 *Hen.* 3. a *Writ* is directed to the Sheriff of *Lincoln*, (*d*) reciting, that whereas it appeared, that *Richard Fitz-dune* dyed not Intestate, *Ideo tibi præcipimus quod omnia Catalla ipsius Richardi in Manum nostram capta in balliva tua sine dilatione habere facias Priori de Noketon*, and other Executors of his Testament *ad faciendum inde rationabile testamentum*: and other like *Writs* occurr in the Rolls of King *John* and *H.* 3.

(*a*) Patent. 3. Reg. Johan. membr. 6.

(*b*) Rot. Claus. 16 Joh. Membr. 22.

(*c*) Claus. 5 H. 3. part. 2. m. 7. & 15.

(*d*) Claus. 7 H. 3. part. 1. membran. 16. idem id ipsum est quod habetur in commentario 9. v. c. Ed. Cooke, f. 38. 6. sumptum est.

CHAP.

CHAP. VIII.

Suits of Legacies perſonal in the Spiritual Court from the beginning of Henry *the Third, of the beginning of that Courſe.*

BUt however it may ſeem by thoſe Teſtimonies, that the Temporal Courts had ſome *Extrinſecal* Juriſdiction of Teſtaments in the time of King *John* and *Hen.* 3. it is clear, that in the beginning of *H.* 3. *Suits for Legacies* perſonal were in the Spiritual Courts, and that it ſeems from Cuſtome ſetled in practice of the former times that were then newly paſt. And perhaps it might be in the more ancient times *fori mixti*, and as well exerciſed in the one, as in the other Court; as we have elſewhere ſhewed of the more ancient Juriſdiction of Tithes; or it may be, that thoſe *Writs* in the former Chapter, and the like, were but in caſe of Tenants being Teſtators, upon whoſe deaths all their goods were to be ſeiſed by the Sheriff, or other ſuch Officer, and the debt (if any were) paid to the King, *Et reſiduum relinquebatur Executoribus teſtamenti defuncti*, as the words are, both of the Charters of King *John* and *H.* 3. (*a*) and perhaps by that Chapter of the Charter thoſe *Writs* may be interpreted, and *faciatis teneri teſtamentum* may be but only an *amoving* of the Kings hands from the goods, that ſo the Executor might perform the Teſtament; for that the Spiritual Court did from the beginning of *H.* 3. exerciſe a Juriſdiction for recovery of Legacies, is infallibly proved by (*b*) Caſes of 2, 4, 6, & 8 *Hen.* 3. and the Attachments upon Prohibitions extant in Records of that time, are, *quare ſecutus eſt placitum in Curia* (*c*) *Chriſtianitatis de Catallis quæ non ſunt de Teſtamento vel matrimonio:* and many ſuch more are both in the *Rolls* and in *Matth. Paris.* It appears alſo in 2 *H.* 3. in the Caſe of *Symon Fitz-Simon*, that even that Suit for deviſeable Land being deviſed, was thought to be good in the Spiritual Court *ex Cauſa teſtamentaria*, as if *Laicum feodum verſum eſſet in Catallum*, until the deviſee had recovered it: and after the recovery, *iterum incipiebat eſſe Laicum feodum* —— as (*d*) *Bracton* ſayes, where his Printed Copy is exceedingly corrupted. But it was clear Law in the time of this *Bracton*, who was a Judge in the *Common Pleas* in the latter part of *H.* 3. that *locum* (*e*) *non habet probatio in Cauſa teſtamentaria ſi Catalla legentur & inde agatur in foro Eccleſiaſtico:* and he reckons that of Teſtaments *inter ſpiritualia, & ſpiritualibus annexa*, which agrees exactly in the known and practiſed Conſultations in the (*f*) Regiſter, *placita de Catallis & debitis, quæ ſunt de Teſtamento & Matrimonio, ad forum Eccleſiæ ſpecialiter dignoſcimus pertinere, &c.* And although in caſe of Legacy, as in caſe of Tithes, the Juriſdiction that gave the recovery of them, was ſometimes in the one, ſometimes in the other Court, before it was reſtrained to the Spiritual only, yet it ſeems by thoſe Caſes of *Henry* the Third's time, which are Teſtimonies beyond exceptions, that the Spiritual Juriſdiction over Legacies, was long before in practice; otherwiſe I gueſs that exception *de Teſtamento, & de Matrimonio*, had not been ſo familiar in the Prohibitions of that Age.

(*a*) Cap. 15. magn. Char. quam etiam donavit Johannes Rex, uti videre eſt apud Matth. Paris.

(*b*) 2 H. 3. tit. prohib. 13.
4 H. 3. ibidem. 28.
6 H. 3. ibid. 17.
8 H. 3. ibid. 19.

(*c*) Mich. 16 & 17 H. 3. Ror. 15 &c. & 18 H. 3. coram W. de Raleigh, &c. Ror. 36. in arce Londinenſi.

(*d*) Lib. 5. Tract. de exceptionibus, cap. 12 pag. 405 1. *b.*

(*e*) Idem fo. 407 6.

(*f*) Regiſter. Orig. fo. 48. (*b*) &c.

Age. And notwithstanding those Cases out of the Records of King *John*'s and *Henry* the Third his time, the Temporal Court not only prohibited not the Spiritual Court, especially in *Henry* the Third's time, but also had not any Conusance of Suits for personal Legacies; for neither have I ever met with any Suit in that kind in the Plea Rolls of *H.* 3. or King *John*, or *Richard* 1. (but very few are extant of the time of the two last) neither doth *Bracton* admit any such thing. And the Author of *Fleta* in the time of *E.* 1. tells us expressly, (*g*) *de Causa Testamentaria sicut nec de causa Matrimoniali Curia Regis se non intromittet.* But the beginning of that practice of the *Extrinsecal* Jurisdiction in the Spiritual Court, is even as difficult to find, as that other of *Probates*. *Linwood* tells us, that (*h*) *libertas quoad secundam scilicet, puniendum impedientes quo minus testamenta & ultimæ voluntates defunctorum procedant, ortum habet à privilegiis etiam in ea parte concessis, & à consuetudine similiter de scientia Regum Angl. diutius observata:* and further, *potuit* (saith he) *habere ortum* out of those (*i*) Laws in the Code that made the Bishop a Protector of Legacies *in pios usus*. It might be also in regard of the purpose of those Laws in themselves; and it were no great wonder, that the Ecclesiastical Court might have gained Jurisdiction over all personal Legacies under colour of such as were given *in pios usus*: But perhaps it will not be admitted for probability enough, that any part of the Code being of the Imperial or Civil Law, was ever so received here in *England*, as that it could induce any alteration touching the Jurisdiction of the Crown, that is, touching this *Extrinsecal* Jurisdiction which (as is shewed) did belong to the Temporal Courts: but whosoever will not admit of any such conjecture, must yet remember, that presently from King *Stephen*'s time, when the *Civil Law* was new born into the light, it having lain forgotten by the space of Six Hundred years before in the *Western Empire*, the Code and other parts of that Law were familiarly read by our *English* Lawyers; and I think as well by our Common as Canon Lawyers: to omit that Case of *Mabile of Franchiville*, wherein, it seems, a special regard was had to the Civil (*k*) Law, that permits not a meer Bastard and Succession *ex Testamento* against a lawful Heir of Blood; for otherwise how could *Richard* the Uncle's Institution, as it seems by a former Will have made colour of right for him, against the latter Will which *Mabile* pretended, unless he relyed upon her being a Bastard. But I should think it probable enough, that the Original of this Jurisdiction for Legacies, was out of the *Canon Law*. And that especially from that Canon *Si hæredes, &c.* before cited; for although the *Decretals*, wherein it stands now authorized for a general Law, were first published but in 24 *H.* 3. by *Gregory* the Ninth, and that we see by infallible testimony already brought, that Legacies before that time, were recoverable in the Spiritual Court, yet by likelihood that very Canon was inserted in all or some of those eight more ancient Compilations of the Canons authorized by some former Popes; (which is the more probable, because we find it also in *Burchard*) and so it might be, long before sufficient ground of this *Extrinsecal* Jurisdiction in the Ordinary; but I sought here for Authority more than I durst be bold in conjectures, which I leave to every mans judgement.

(*g*) Fleta lib. 2. cap. 57. Sect. Executor.

(*h*) Ad tit. de testam. c. Statut. verb. Ecclesiast. libertat.

(*i*) De Episc. & Cler. & nulli 28. & siquis ad designandum, 49. &c.

(*k*) Cod. de lib. Natur. l. 2. Matr. & Author. 89, &c.

PART II.

OF THE Diſpoſition or Adminiſtration OF Inteſtates Goods.

CHAP. I.

In whom it was in the time of the Saxons.

IN the *Saxons* time it was in the Lord of him that dyed (underſtand the Chief Lord) in caſe the Inteſtate were a Tenant, and dyed at home in peace: But in caſe he were no Tenant, or dyed in his Lords Army, then it was (it ſeems) as other Inheritance under the Juriſdiction of that Temporal Court within whoſe Territory the goods were: This may be proved out of the Laws of that time, which ordain, that upon the death of an Inteſtate, whom they call ciale aſe, the Lord (*a*) is only to have the *Heriatts* due to him, which are alſo appointed by (*b*) the Laws of the ſame time, *That by his* (the Lords) *advice or judgement his* (the Inteſtates) *goods be divided among his Wife and Children and the next of Kin, according as to every one of them of right belongs*, that is, according to the nearneſs of Kindred, if no Children or Nephews from them be; for it muſt, I ſuppoſe, be underſtood, that the ſucceſſion was ſuch, that the Children excluded all their Kindred, and of their Kin-

(*a*) Canuti leg. cap. 68.

(*b*) Ejuſdem leg. cap. 68.

dred the next ſucceeded, according to that in *Tacitus* (*c*) of his *Germans*, whoſe Cuſtoms were doubtleſs mixt with our *Engliſh Saxons*, *hæredes*, ſayes he, *ſucceſſoreſque ſint cuique liberi, & nullum Teſtamentum.* But it ſeems, Chriſtianity afterward brought in the free power of making Teſtaments amongſt them, *Si liberi non ſunt, proximus gradus in poſſeſſione fratres, patrui, Avunculi.*

(*c*) De moribus Germanorum.

But this is expreſt only in caſe the Tenant dyed at home and in peace; for if he dyed in his (*d*) Lords Army, both the Heriott was forgiven, and the Inheritance both of Goods and Lands was to be divided *as it ought*, which was, it ſeems, by the Juriſdiction of the *Temporal Court* within whoſe Territory the Death or Goods were; for in that caſe, it is not ſaid, that the Lords Judgement was to be uſed, but that the Heirs ſhould divide all; or, as the words in the *Confeſſor*'s Law are, *habeant* (*e*) *hæredes ejus pecuniam & terram ejus ſine aliqua diminutione, & rectè dividant interſe*; where the right of the Heir both to Lands and Goods is expreſly deſigned, but the Judge that ſhould give it them, not mentioned. Therefore it ſeems, it remained as other parts of the Common Law, under the Temporal Juriſdiction, as by the (*f*) Civil Law it is under the Pretors.

(*d*) Canut. legibus, cap. 75.

(*e*) Leg. Ed. Confeſſ. cap. de heretochiis.

(*f*) F. S. Inſtit. de bonorum poſſeſſione.

CHAP.

CHAP. II.

In whom after the Normans *until King* John's *time.*

UNtil King *John*'s time it seems the Jurisdiction over *Intestates* Goods, was as of other Inheritance also, in the Temporal Courts: yet no sufficient Testimony is found to prove it expresly; only when the Common Laws of those times speak of *Intestates*, they determine the succession by like division as those of the *Saxon* times. In Laws attributed to *William* the First we read, *Si home moruſt ſans deviſe, ſi departent les Infants l'erite inter ſei per ovell.* And afterwards in *H.* 1. (*b*) Laws, *ſi quis Baronum vel hominum meorum praeventus vel Armis vel infirmitate pecuniam ſuam nec dederit, nec dare diſpoſuerit, uxor ſua, ſive liberi, aut Parentes, & legitimi homines ſui pro anima ejus eam dividant, ſicut eis melius viſum fuerit.* Here is the *firſt mention*, as I remember, of any thing occurring in our Laws or Hiſtories, of the diſpoſition of the Inteſtates Goods, *pro anima ejus*, which indeed might have been fitly ſubjected to the view at leaſt of the Church. But no mention as yet being of any Eccleſiaſtical Power that tends that way, I rather think that heretofore no uſe or practice was of Adminiſtration committed, direction given, or medling with the Goods by the Ordinaries; but all was by the *Friends* or Kindred *juxta Conſilium diſcretorum virorum*, as the words are in (*c*) the Statutes made for ſuch as ſhould dye in the *Holy War* with *Richard* the Firſt.

(*a*) Adſiciuntur Ingulpho Crolandenſi MS. in Bibliotheca Cottoniana.

(*b*) Apud Matth. Paris.

(*c*) Will. Novoburg. hiſt. l. 3. c. 22.

Neither doth that of *Glanvill*, which was written under *H.* 2. tell us of any thing of the Ordinaries Power in this caſe, although it hath expreſs mention of *Teſtaments*, and the Churches Juriſdiction of them. Indeed we there find, that if no Executor be named, then (*d*) *poſſunt propinqui & conſanguinei Teſtatoris*, take upon them the Executorſhip, and ſue in the Kings Court againſt ſuch as hinder the due payment of Legacies; which alſo agrees well enough with that before cited out of the Laws of *H.* 1. Neither is there in *Gualter Mapes* his *Apocalypſis* (being a bitter Satyr againſt the Abuſes of the Spiritual Courts in *Henry* the Seconds time) nor in *John* of *Salisbury*'s Epiſtles, that have many particulars of the exerciſed Juriſdiction of the Church, any thing occurring, that touches upon any Eccleſiaſtical Powers of this nature.

(*d*) Glanvill. lib. 7. cap 6.

CHAP. III.

In whom after the time of King John.

But in that Charter of Liberties both for the Church and Laity made to the Baronage of *England* in the ſeventeenth of King *John* (a) in *Reningmead* an expreſs Ordinance is, *That if any Free-man dyed inteſtate, his Chattels were to be diſpoſed of by the hands of his next of kin, by the view of the Church*, that is, direction and advice being thereto given by the Ordinary, as I underſtand, *ſaving to all Creditors their debts*: the words of it were, *Si aliquis liber homo inteſtatus deceſſerit, Catalla ſua per manus propinquorum, parentum, & amicorum ſuorum, per viſum Eccleſiæ diſtribuantur, ſalvis unicuique debitis, quæ defunctus eis debebat.* That Charter of King *John* is almoſt the ſame ſyllables with the common one that we now uſe by the name of the *Grand Charter* of 9 *H.* 3. exemplified by the Kings Patent of 28 *E.* 1. But this of Inteſtates, and two or three other Chapters for the Subjects Liberty, are more in that of King *John*'s, than is found in the Exemplification of 28 *E.* 1. However *Matthew Paris* and *Roger* of *Wendover* when they ſpeak of *H.* 3. granting it, ſo refer their Readers to this of King *John*, that they tell us, that that of *H.* 3. was the ſelf ſame in every particular; and therefore omit the repetition of it. And indeed, although in the common Printed *Magna Charta* of *H.* 3. and in the Roll alſo of 28 *Ed.* 1. in the *Tower*, where the Exemplification is, this Ordinance touching *Inteſtates* be wanting, yet in very many of the ancienteſt Manuſcripts of the old Statutes, that of *H.* 3. hath the ſame words as we have here tranſcribed it from King *John*'s, and that in the ſame place of his Charter as that in King *John*'s; that is, between the eighteenth Chapter; *Si quis tenens, &c.* and the nineteenth, *Nullus Conſtabularius, &c.* And it is to be underſtood, that the greateſt Prelates of the Clergy of that time, as *Canterbury*, *London*, *Wincheſter*, *Pandulphus* the Popes *Nuncio*, the Maſter of the *Temple*, and divers other Biſhops were on the Kings part, when that of King *John* was granted. And it is probable enough, that when they ſaw that a Charter of Liberties muſt of neceſſity be granted to the *Baronage*, they ſo wrought alſo, that they might inſert this one for the advantage of their Epiſcopal Government. And they had good colour to think and perſwade, that ſome ſuch thing was fit for them, in regard it was now clearly taken, that ſome diſtribution was to be made *pro anima inteſtati*, the *care* of *ſouls* being the chiefeſt part of their common pretences for increaſe of their power and greatneſs. And hence I ſuppoſe, it ſoon came to paſs, that the next of kin had the power of diſpoſition committed by the Ordinaries, and that in Letters or otherwiſe by vertue of that *per viſum Eccleſiæ*, which was, I think, the textual ground of right of committing of Adminiſtration by the Clergy: This of King *John*'s being iterated in *Henry* the Thirds Charter (however omitted in the Exemplification) was it ſeems that proviſion ſpoken of in Cardinal *Othobon*'s *Legatins*, *Proinde ſuper bonis ab inteſtato decedentium*, (b) ſo

(a) Reperiuntur ſcorſim ſæpius exemplaria illius diplomatis & penes Matth. Paris, Rogerum Wendover MS. & Thom. Rudburne MS. extant, ſed in Archivis non extant.

V. Manuſcriptum noſtr. de Magn. Charta, cap. 16. in fine.

(b) Cap. cum mortis incerta.

are

are the words, *provisionem quæ olim à Prælatis Regni Angliæ cum approbatione Regis & Baronum dicitur emanasse, firmiter approbantes, districtius inhibemus ne Prelati vel alii quicunque bona intestatorum quocunque modo recipiant, vel occupent contra provisionem præmissam.* What *provision* is it more likely that this was, than that of the Grand Charter both of King *John* and *H.* 3. and the words *à Prælatis dicitur emanasse*, justifies what we have conjectured of the purpose of the Prelates, when they saw they could not but yield with the King, to an establishment of Laws, by that Charter, made indeed in a Parliament of that age. The same I suppose that which is meant in the (c) Constitution of Arch-bishop *Stafford*, where it is taken for granted, that the Churches power of disposition of Intestates goods *pro salute animarum & in pios usus*, was a thing *consensu Regio & magnatum Regni Angl. tanquam pro jure Ecclesiastico; libertate ab olim ordinatum, &c.* Where *Linwood* modestly confesses, that he could not find in what Kings time this Ordinance was made. But *Johannes de Athona*, upon that of *Othobon*, though he rightly call that provision, *Provisio Parliamentalis:* yet most ignorantly and ridiculously (d) tells us, *that the provision there understood, is the Statute of Westminster*, 2. *Cap.* 21. *cum post mortem*, which he makes also to have I know not what reference to the Statute of *Gloucester*. But this slipt from him either in a dream, or through the utmost neglect of those infallible characters of truth, that the denoting of times affords us, for that *Legatin* of *Othobon* was made in *London* in (e) 53 *H.* 3. and at such time as that *Provision* was yet extant in the *Magna Charta*, used by our Lawyers. But the Statutes of *Westminster* the second, and of *Gloucester* were under *E.* 1. the one in the sixth, the other in the thirteenth of him; how then could *Othobon* think of it in his Legatin, or could *John de Athona* have thought so, if he had allowed the Title of his Gloss, which supposes in the point, that the Constitutions of *Othobon* were published in the year 1248. which had it been in 1268. had agreed with truth; but doubtless the Numeral Letters of MCCLXVIII were transposed into MCCXLVIII. and thence only that Error.

(c) Provinc. Constitut. tit. de immunitate Ecclesiæ, C. accidit novitate.

(d) Jo. de Athona ad Legat. Othobonum c. cum mortis incerta.

(e) Præter Annales obvios, Linwood ad C. quia verb. Ottobo-ni, tit. de constitutionibus.

CHAP.

CHAP. IV.

How that so granted by King John's *Charter in Parliament hath continued in practice.*

AFter that Law of the seventeenth of K. *John*, it seems the *next of kin* disposed of Intestates Goods by the testimony and direction of the Church; for so *per visum* denotes, as we see in *per visum proborum & legalium hominum* in Writs of Summons and the like: but I have not seen any practice of it testified in King *John*'s time. And under *H.* 3. however it were omitted in his Charter at the Exemplification, the same *visus Ecclesiæ* continued; so sayes *Bracton* that then lived, and was a Judge of that time, *Si* (*a*) *liber homo intestatus & subito decesserit, dominus suus nil intromittat de bonis defuncti, nisi de hoc tantum, quod ad ipsum pertineret,* (*sc. quod habeat suum Heriott.*) *sed ad Ecclesiam & amicos pertinebit executio bonorum.* Yet it seems also, that notwithstanding the right of the Church thus ordained, and the succession of next of kin so included in the Ordinance, both the Lords in some places, according to their former right, still usurp some power over the disposition of Intestates Goods, against the will of the Ordinaries: and on the other side also, the Ordinaries, instead of giving direction for a true disposition of such Goods, get possession of them, and commit them often, or at least too great a part of them, to the use either of themselves, or of the Church, and so *defrauded* those to whom by the right of natural succession they pertained. For that of the Lords, *Bracton* his noting it as a thing denyed them, compared with what we find among Articles granted in the Synod of *London* held under *Boniface* Arch-bishop of *Canterbury* in 42 *H.* 3. proves it, *Idem quod mortuo* (so is the (*b*) Article) *laico sine Testamento non capiantur bona ipsius in manus dominorum. Sed inde solvantur debita ipsius, & residua in usus filiorum suorum, & proximorum indigentium pro salute animæ defuncti in pios usus per Ordinarios committantur, nisi quatenus fuerit domino suo obligatus.* Here we see by the way plainly that the distribution *in pios usus*, was the devising them among the next of kin, according to their nearness and want; not an imploying them to other uses, at the Ordinaries arbitrary disposition. But also that the Ordinary did in this Age sometimes usurp the Goods of Intestates against the next of kin, is enough proved out of that Legatine Constitution of *Othobon, cum mortis incerta, &c.* where it was ordained as you see before; so in the words of it, that they should not dispose of them otherwise than according as that Grant was in the *Grand Charter*; that is, to the benefit of the next of blood: But the Ordinaries had about this time, against the intent of that *Charter*, so abused the right of succession, that it was related (*c*) for a constant truth, that the *Custome in Britania* was, that *tertia pars bonorum decedentium ab intestato in opus Ecclesiæ & pauperum dispensanda, &c.* as *Innocent* the Fourth his words are, who lived and wrote in the time of *H.* 3. What other ground than the Ordinaries *ill dealing* with the next of blood was for that *tertia pars* I conceive not; unless the Pope had

(*a*) Bracton. lib. 2. de acq. rer. dom. cap. 26. sect. 2.

(*b*) In Annal. Burtonensis cœnobii penes v. cl. Thom. Allen Oxoniensem MS. A. 1257.

(*c*) Innocent. 4. tit. de Simonia, c. ad Apostolicum.

had some such other Testimony touching it, as we find in an old Manuscript Volume titled (*d*) *Statuta Synodorum* written in an hand of near seven hundred years since, being a Collection out of the Fathers and old Councils, made as it seems by some *Britain* or *Irish-man*, as we have elsewhere conjectured. In that *Statuta Synodorum* occurrs *Orig. in lib. de hæredibus: pater moriens det tertiam partem filiis, & tertiam Cæsari, & tertiam Ecclesiæ; si non habuerit Ecclesiam, det pauperibus, & si non habuerit Cæsarem nec Ecclesiam, dividat inter filios & pauperes.* But what Author this is cited out of, I am equally ignorant, as I know not at all who was the Author of the whole Collection, or whence he had many other of his Authorities. And other things that Volume hath out of some old Synod of *Ireland*, which makes to our present purpose, if the Canons of that Synod had been at all binding in this State. And it was no such wonder, that some such practice might be under *H.* 3. for since also in the time of *E.* 3. the Church *so usurped* in their Jurisdiction of *Probates*, that they made the Executors wait on their Officials at uncertain and remote places, and then also put them, at times, to the Ransom of the fourth or fifth part of the Testators Goods, before they would give them *Probate*; which was complained (*e*) of in Parliament amongst the Grievances of the Commons.

(*d*) MS in Thesauro Cottoniano c. 31. de divisione hæreditatis.

(*e*) Parl. 21 E. 3. Cro. Hill. art. 51. & consule si vis Parl. octab. Purif. 23 E. 3. art. 35. *in Archivis.*

CHAP.

CHAP. V.

Of that of bona Inteſtatorum in manus Domini Regis capi ſolebant.

FOr that of *bona Inteſtatorum in manus Domini Regis capi ſolebant*, for which is cited (*b*) the Cloſe Roll of 7 *H.* 3. *Rot.* 16. it is alſo moſt true, if rightly apprehended. All that appears in the Record is, that the King wrote to the Sheriff of *Lincoln*, that *conſtat nobis per inquiſitionem nobis miſſam ſub ſigillo Stephani de Segrave, & aliorum proborum & legalium hominum, quod Richardus filius Dunæ non obiit inteſtatus*, and therefore he commands, that the Sheriff ſhould deliver all the Goods of the ſaid *Fitz-dune in manus noſtras capta*, to the Prior of *Loketon*, and others his Executors, *ad faciendum Teſtamentum:* neither are there any words that tell us of any *capi ſolebant*, or that theſe were taken in regard of dying inteſtate only. Indeed it appears not ſufficiently in the Writ, why they were taken; but it is moſt probable, that the *ſeiſure* was for ſome debt due to the Crown from the Inteſtate, which afterward not appearing, or being ſatisfied, or it appearing that the Executors by the taking upon them the execution of the Teſtament, would ſubject themſelves to the payment of it, it was fit enough to amove the Kings hands, and deliver all over to the Executors: He that well conſiders the Statute of *Magna Charta cap.* 18. *Si quis tenens*, and compares it with that of *Bracton*, where he tells us, that the Law was clear, that *if any man dyed indebted to the King, the Sheriff might* (*b*) *imbreviare, & attachiare cattalla defuncti*, will ſoon ſee the probability of this, howſoever the words of the Statute are only of the Kings Tenants: And it concludes alſo, as if it were only in caſe of the death of a Teſtator in regard of *relinquatur executoribus ad faciendum teſtamentum defuncti*; but plainly, that *ad faciendum, &c.* hath equal reference to the Inteſtates as to Teſtators: for no name of an *Adminiſtrator* being then uſually known, all were called *Executors* that medled with the *Inteſtates* Goods; and thoſe Executors were *executores qui faciebant Teſtamentum*, that is, which inſtead of the Inteſtate (*c*) did take ſuch order after his death with his Goods, as they thought he would have done if he had made a Teſtament; which may be conceived alſo out of the uſe remembred in that time, wherein ſick men being unable, neither having time to expreſs their meaning, choſe out ſome friends that might be *ſuper* (*d*) *hoc expreſſores & executores*; which friends appointing of Legacies (as if the Inteſtate had given them) and making diſpoſition of Inteſtates Goods, were as Teſtaments of thoſe Inteſtates; and they did truly as Executors *facere Teſtamentum defuncti*, in which ſenſe it might be ſpoken of any Executors or Adminiſtrators that intermedled in thoſe times. And many Writs occurr in the Cloſe Roll of King *John* and *H.* 3. that have expreſly in them the *amoving* of the Kings hands from the Goods of the dead, when the ſeiſure had been only for the debts to the Crown, according to the Statute of *Magna Charta* (which in ſubſtance is the Law at this day) and *Bracton*, by reaſon whereof, I ſee not cauſe enough, why

(*a*) Henſloes Caſe apud v. cl. Ed. Coke part 9. ſect. 39, 40.

(*b*) Bracton. lib. 2. de acq. rerum dom. cap. 26. ſect. 2.

(*c*) Ita facere teſtamentum nomine defuncti ſumitur apud Canonici juris peritos. videſis Zebulam prax. Epiſcop. verb. legatum, ſect. 8.

(*d*) Mos iſte reperitur apud Matth. Paris, hiſtor. major, pag. 982. Ubi de Pontificia conſtitutione de inteſtatis edit. Londineaſ.

why we ſhould underſtand that of 7 *H.* 3. to prove any ſuch thing, as a Cuſtom of the Kings diſpoſing or ſeiſing of the Inteſtates Goods, eſpecially in regard that in the paſſages of the Law, Lawyers and Records of that time, no mention is of any thing that affirms it to be a Cuſtom, or touches it as a common uſe.

But admit that in *Fitz-dunes* Caſe it had been ſo, that the taking of the Goods into the Kings hand, had been becauſe of his dying *Inteſtate* only. It may therefore be accounted rather as a particular of the irregular practice of that time, than any example to prove a Cuſtom; and whoſoever is but acquainted with the courſe of the Records of King *John* and *Henry* the Third his time, muſt ſoon ſee Writs enough that agree not ſo much as with any ſetled courſe of Law, but taſte rather of ſome ſudden or arbitrary courſe of granting them. Indeed ſome two years before that of *Fitz-dune*, there is an example in *Bedfordſhire*, that might ſeem more fully to prove what is collected out of the other: the Writ is thus, *Rex* (e) *Vicecom. Bedford ſalutem. Præcipimus tibi quod blada & catalla quæ fuerunt Roberti de Inſula & Roſſiæ uxoris ejus defunct. in Wahall & Brokeberge areſtari facias & ſalvo cuſtodiri, donec diſcuſſum fuerit in curia noſtra ad quem catalla illa pertinent, & aliud inde præcipimus*; but this is often enough ſeconded with other examples that have for the moſt part a mention of the Defuncts debts to the Crown, that it cannot otherwiſe be underſtood, but either as founded upon that Law of ſeiſing upon the Goods for debt to the Crown by Prerogative, or as an example (amongſt many of other kinds) that diſcovers a more arbitrary courſe ſometimes in proceeding, than later time hath permitted. And according to one of thoſe wayes (but the firſt that is upon the Statute of the *Grand Charter* is the fitteſt and moſt probable) muſt that alſo be interpreted, where (f) *H.* 3. ſends a Writ to the Sheriff of *Rutland* to *command him, that notwithſtanding that* Robert de Weſton *a Pariſhioner of* Weſton *were drowned, and dyed inteſtate*, he ſhould yet *facere Willielmo de S. Lando* (that is, to the Parſon of the Pariſh) *habere nomine Eccleſiæ ſuæ id quod ad eum pertinet, habendum de catallis quæ fuerunt prædicti Roberti, ſecundum conſuetudines partium illarum*: that was for the *mortuarie*, which properly and under that name then was determinable in the Spiritual Court.

(e) Clauſ. 5 H. 3. par. 2. memb. 3.

(f) Clauſ. 17 H. 3. memb. 8.

But ſurely we muſt conclude, that if there were any ſuch practice by the Officers of the Crown in the time of *Hen.* 3. to ſeiſe *Inteſtates* goods generally, it was not ſo much the Law of the time; for if ſo, the Records could not be but as full of examples of it, as the time was of the death of Inteſtates, which queſtionleſs were very many; but ſome ſuch temporary uſurpation, as in 31 *H.* 3. Pope *Innocent* the Fourth here had for a while executed by his Miniſters the *Franciſcans* and *Dominicans*, in not only getting into his own hands, but alſo to his own uſe, all the *Goods of the Clergy-men* that dyed *Inteſtate* through *England*, which as *Matthew Paris* that then lived, relates it, *cum audiſſet dominus Rex, deteſtans Romanæ Curiæ augmentoſam & multiplicem avaritiam, hoc fieri prohibuit, comperiens illud ad damnum Regni & ſuum redundare præjudicium.* Afterward in the time of *Edw.* 1. it appears by the Statute of *Weſtm.* 2. *cap.* 21. *cum poſt mortem, &c.* that the

(g) Matth. Paris, fo. 959. Edit. Londinenſ.

the Goods of *Inteſtates* did come *ad Ordinarios diſponenda*, which agrees with that of *Bracton* before cited, and iterated in the ſame ſyllables in *Fleta* (*b*) which was written under *E.* 1. And the diſpoſition of *Inteſtates* Goods was enquired after in thoſe dayes (*i*) amongſt Articles of Eccleſiaſtical Juriſdiction. And afterwards by the Statute of 31 *E.* 3. the Ordinary was compelled to commit the adminiſtration of Inteſtates Goods to the next of kin: after which Statute the name of *Adminiſtrator* was common as their Office; and by that name ſuch to whom the Ordinary committed were ſued, although before that time they were ſuable by the name of *Executors*, and perhaps alſo by the name of *Adminiſtrators*: (*k*) but that name is ſcarce found (as I think not at all) given a Defendant to an Action brought before ſeven years after the Statute of 31 *E.* 3. And in the Parliament Rolls of 17 *Ed.* 3. the *Adminiſtrators* are deſigned only by the *Ceux que ſont per l'Eveſque ordines en lieu des Executors*, where a Petition is offered (*l*) by the Commons, that ſuch might have the like Actions as their *Inteſtates*: but the King anſwers, *Quant à ceux qui devient inteſtate le Roy voet que l'Eveſque eit action en tien caſe depuis que il doit reſponder as autres.* But from that of 31 *E.* 3. ſaving only the alteration by 21 *H.* 8. the Law hath continued uniformly to this day.

(*b*) Fleta l. 2. c. 57.

(*i*) Quod videre eſt in Cro. Wigorn. Eccleſiæ in Biblioth. Cott. ſub initio E. 1.

28 E. 3 fo. 21. *a.*

(*k*) Videſis 25 E. 3. fo. 54. *a.* ſed & plura in l. 9. Vir. cl. E. Cook par. 5. fo. 82. & par. 9. f. 39. & 40. & 19 Ed. 3. tit. Covenant. 24.

(*l*) Quindena Paſch. 17 E. 3. Artic. 49.

FINIS.

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